

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL MAY,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Case No. C09-5591KLS

ORDER AFFIRMING THE
COMMISSIONER'S DECISION TO DENY
BENEFITS

Plaintiff has brought this matter for judicial review of the decision of the Commissioner of Social Security (the "Commissioner") to deny his applications for child disability insurance and supplemental security income ("SSI") benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining record, the Court hereby finds and orders that for the reasons set forth below, the decision of the Commissioner's in this case should be affirmed.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff currently is 27 years old. Tr. 31. He has a college education and no past relevant work. Tr. 20, 28, 97, 102, 131, 136, 1457-58, 1502-03, 1529-30. On December 21, 2001, plaintiff filed applications for child disability insurance¹ and SSI benefits, alleging disability as

¹ Plaintiff is entitled to child disability insurance benefits if he is "18 years old or older and [had] a disability that began before [he] became 22 years old." 20 C.F.R. § 404.350(a)(5). In this case, plaintiff attained the age of 22 on December 11, 2004. See Tr. 15.

1 of August 10, 2001, due to systemic onset juvenile rheumatoid arthritis. Tr. 12, 90-91, 130, 698-
2 702. His applications were denied initially and on reconsideration. Tr. 12, 33-34, 44, 49, 707-08.

3 A hearing was held before an administrative law judge ("ALJ") on June 28, 2004, at which
4 plaintiff, represented by counsel, appeared and testified, as did a medical expert and a vocational
5 expert. Tr. 1451-96. That hearing was continued, however, in order to obtain further
6 consultative examinations. Tr. 714. A second hearing therefore was held before the same ALJ
7 on August 15, 2005, at which plaintiff, represented by counsel, again appeared and testified, as
8 did a different vocational expert. Tr. 714-15, 1497-1523.

10 On October 27, 2005, the ALJ issued a decision in which she determined plaintiff to be
11 not disabled, finding specifically in relevant part that he was capable of performing other jobs
12 existing in significant numbers in the national economy. Tr. 714-29. On March 14, 2007, the
13 Appeals Council granted plaintiff's request for review, vacating the ALJ's decision and remanding
14 the matter for further administrative proceedings. Tr. 755-56. On May 10, 2007, the same ALJ
15 held a third hearing, at which plaintiff, represented by counsel, appeared and testified, as did a
16 different medical expert and a different vocational expert. Tr. 1524-70. Upon the submission by
17 plaintiff's counsel of "more than 500 pages of additional medical evidence," that ALJ held a fourth,
18 supplemental hearing, at which plaintiff, represented by counsel, once more appeared and
19 testified, as did yet another medical expert, and the same vocational expert who appeared at the
20 first hearing. Tr. 1571-1614.

23 On October 25, 2007, the ALJ issued a second decision in which she again determined
24 plaintiff to be not disabled, finding specifically in relevant part that:

25 (1) at step one of the sequential disability evaluation process,² plaintiff had not

26 ² The Commissioner employs a five-step "sequential evaluation process" to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step, the disability determination is made at that step, and the sequential evaluation process ends. Id.
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engaged in substantial gainful activity since his alleged onset date of disability;

- (2) at step two, plaintiff had “severe” impairments consisting of rheumatoid arthritis, Cushing syndrome, osteoporosis, obesity, and a pain disorder associated with psychological factors and a general medical condition;
- (3) at step three, none of plaintiff’s impairments met or medically equaled the criteria of any of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (the “Listings”);
- (4) after step three but before step four, plaintiff had the residual functional capacity (“RFC”) to perform light exertional work, with certain additional non-exertional limitations³;
- (5) at step four, plaintiff had no past relevant work; and
- (6) at step five, plaintiff was capable of performing other jobs existing in significant numbers in the national economy.

Tr. 12-30. Plaintiff’s request for review was denied by the Appeals Council on August 14, 2009, making the ALJ’s second decision the Commissioner’s final decision. Tr. 8A; see also 20 C.F.R. § 404.981, § 416.1481.

On September 23, 2009, plaintiff filed a complaint in this Court seeking review of the ALJ’s second decision. (Dkt. #1-#3). The administrative record was filed with the Court on December 14, 2009. (Dkt. #10). Plaintiff argues the ALJ’s second decision should be reversed and remanded to the Commissioner for an award of benefits for the following reasons:

- (a) the ALJ erred in evaluating the medical evidence in the record;
- (b) the ALJ erred in finding plaintiff’s impairments did not meet or medically equal the criteria of any of those contained in 20 C.F.R. Part 404, Subpart P, Appendix 1 (the “Listings”);
- (c) the ALJ erred in assessing plaintiff’s credibility; and

³ “Exertional limitations” are those that only affect the claimant’s “ability to meet the strength demands of jobs.” 20 C.F.R. § 404.1569a(b). “Nonexertional limitations” only affect the claimant’s “ability to meet the demands of jobs other than the strength demands.” 20 C.F.R. § 404.1569a(c)(1).

- (d) the ALJ erred in finding plaintiff to be capable of performing other work existing in significant numbers in the national economy.

For the reasons set forth below, the Court disagrees that the ALJ erred in determining plaintiff to be not disabled, and therefore finds that the ALJ's decision be affirmed.

DISCUSSION

This Court must uphold the Commissioner's determination that plaintiff is not disabled if the Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984).

I. The ALJ's Evaluation of the Medical Evidence in the Record

The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in the record is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v. Commissioner of the Social Security Administration, 169 F.3d 595, 601 (9th Cir. 1999). Determining whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and whether certain factors are relevant to discount" the opinions of medical experts "falls within this

responsibility.” Id. at 603.

In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings “must be supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ can do this “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” Id. The ALJ also may draw inferences “logically flowing from the evidence.” Sample, 694 F.2d at 642. Further, the Court itself may draw “specific and legitimate inferences from the ALJ’s opinion.” Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record.” Id. at 830-31. However, the ALJ “need not discuss all evidence presented” to him or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

In general, more weight is given to a treating physician’s opinion than to the opinions of those who do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and inadequately supported by clinical findings” or “by the record as a whole.” Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). An

1 examining physician's opinion is "entitled to greater weight than the opinion of a nonexamining
2 physician." Lester, 81 F.3d at 830-31. A non-examining physician's opinion may constitute
3 substantial evidence if "it is consistent with other independent evidence in the record." Id. at 830-
4 31; Tonapetyan, 242 F.3d at 1149.

5 A. Dr. Roes

6 In his decision, the ALJ found in relevant part as follows:

7
8 William F. Roes, M.D., [a] treating physician, performed a physical
9 evaluation on December 28, 2001, . . . He opined that the claimant was
10 severely limited, which was defined as unable to lift two pounds or unable to
11 stand and/or walk. Dr. Roes indicated that the claimant could not work even
12 half time, but could possibly be released to work in 2003 (Exhibit 11Fp2).
13 The undersigned assigns no weight to this opinion as it appears to be based, in
14 large part, on the claimant's complaint of dyspnea on the day of the evaluation.
15 The chart note indicates that the claimant told Dr. Roes that he could walk
16 only ten feet before becoming short of breath (Exhibit 11Fp5). He made no
17 such complaint at the previous appointment on November 12, 2001 (Exhibit
18 11Fp6). The claimant completed a form for Dr. [Gurjit S.] Kaeley[, M.D.,] on
19 December 27, 2001, and indicated that he could walk two miles without any
20 difficulty (Exhibit 12Fp10). Dr. Kaeley's chart notes from that visit do not
21 indicate that the claimant complained of shortness of breath. The undersigned
22 notes that the claimant's sudden inability to walk even 10 feet without
23 shortness of breath is suspect given that he reported no difficulty walking two
24 miles just one day before. The next report from January 31, 2002, does not
25 describe shortness of breath and indicates that the claimant was doing well
26 overall (Exhibit 12Fp1).

Dr. Roes provided a medical source statement on September 11, 2002. He
reported that the claimant was fairly stable on medications, but continued on a
medical regimen with multiple side effects and potential medical
complications. Dr. Roes reported that the claimant was going to school with a
low class load, which he tolerated well. Dr. Roes reported that he did not
believe that the claimant was physically capable of working or meeting the
rigors of daily employment (Exhibit 22F). The undersigned assigns no weight
to this opinion. The claimant reported that he completed his Associate of Arts
degree in a normal amount of time, which does not indicate low class loads.
The ultimate issue of disability is reserved to the Commissioner, and treating
source opinions on issues reserved to the Commissioner are never entitled to
controlling weight or special significance (Social Security Ruling 96-5p).
Moreover, Dr. Roes did not provide any rationale for his conclusion that the
claimant was not physically capable of working.

1 Dr. Roes performed another physical evaluation on December 9, 2002, . . .
2 The claimant complained of right shoulder, knee, and hip pain. Dr. Roes
3 opined that the claimant was limited to sedentary work and could not work
4 even half time for another year (Exhibit 21Fp22). He completed another . . .
5 evaluation on October 31, 2003, and opined that the claimant was limited to
6 sedentary work. The undersigned gives little weight to these opinions and
7 notes that Dr. Roes did not give specific reasons for his estimates. The fact
8 that Dr. Roes is a treating physician does not automatically entitle his opinions
9 to weight since he did not provide a significant explanation regarding the basis
10 for his conclusions.

11 Tr. 27-28. Plaintiff argues these reasons for rejecting the opinions of Dr. Roes were not valid.

12 The undersigned disagrees.

13 First, it does seem, as the ALJ noted, that Dr. Roes based his December 28, 2001 opinion
14 that plaintiff was unable to lift even 2 pounds or stand and/or walk primarily on plaintiff's self-
15 report that he gets "dyspnea with exertion to the point where he can walk about ten feet before he
16 starts getting short of breath." Tr. 465, 468. Indeed, the clinical findings Dr. Roes obtained at the
17 time were largely unremarkable, revealing no objective evidence of problems with shortness of
18 breath on plaintiff's part. See Tr. 464, 468. Also, as expressly noted by the ALJ, plaintiff had
19 reported to Dr. Kaeley just the day before that he could walk for 2 miles without difficulty and,
20 no other indication of problems with shortness of breath were noted either then or at the next
21 visit with Dr. Kaeley in late January 2002. See Tr. 469, 471, 477-78, 480; see also Batson, 359
22 F.3d at 1195 (ALJ need not accept opinion of treating physician if it is inadequately supported by
23 clinical findings or by record as whole).

24 The ALJ also properly rejected the September 11, 2002 opinion of Dr. Roes that plaintiff
25 was not "physically capable of working at this time or meeting the rigors of daily employment," on
26 the basis that no rationale was provided therefor. See Tr. 671. Again as found by the ALJ, the
fact that Dr. Roes himself noted that plaintiff was "currently fairly stable on his medications" and

1 was “going to school”—albeit “with a low class load”—and was “tolerating this well” (Tr. 671),
2 additionally calls into question the credibility of this medical opinion. See Batson, 359 F.3d at
3 1195. As the ALJ further found, the record actually reveals that plaintiff completed his degrees
4 in a normal—and, it appears from the record, even quicker—amount of time. See Tr. 1457-58,
5 1461-62, 1511-12, 1529-30, 1532-33 (plaintiff testifying he received his two associates degrees
6 “actually a little quicker” and his bachelors degree after 13 months of study in “an accelerated
7 online program”).
8

9 Lastly, as with the previous opinions concerning plaintiff’s ability to work issued by Dr.
10 Roes, the ALJ did not err in rejecting his early December 2002, and late October 2003 opinions
11 that plaintiff could not perform above the level of sedentary work, on the basis that Dr. Roes did
12 not provide any specific reasons for assessing that level of restriction. See Tr. 619, 621-22, 628,
13 674-75. Again, what objective clinical findings Dr. Roes did include in his evaluation reports or
14 treatment notes at those times were relatively mild, or at least did not provide sufficient support
15 for a restriction to sedentary work as found by the ALJ. The Court, therefore, finds the ALJ did
16 not give insufficient reasons for declining to adopt the opinions of Dr. Roes.
17

18 B. Dr. Kaeley and Dr. Khan

19 The ALJ further found in relevant part as follows:

20 Dr. Kaeley performed a physical evaluation on November 20, 2004 . . . He
21 opined that the claimant was capable of light work with limitation on
22 climbing, pulling, pushing, and reaching. Dr. Kaeley opined that the claimant
23 could not work when the juvenile rheumatoid arthritis flared up (Exhibit
24 38Fp4). The undersigned assigns some weight to the opinion of Dr. Kaeley
25 and notes that the claimant’s rheumatoid arthritis last flared in July 2001,
26 which was prior to the claimant’s alleged disability onset date [of disability]. It
is noted that Dr. Kaeley indicated that the claimant could not participate in
pre-employment activities, which was apparently based on the fact that the
claimant was attending college. This does not provide a basis for awarding
disability benefits. . . .

1 . . .

2 Muhammad Khan, M.D., another treating doctor, performed a physical
3 evaluation on December 7, 2005, . . . He opined that the claimant was capable
4 of performing “light-sedentary” work. Dr. Khan indicated that the claimant had
5 limitations with bending, balancing, climbing, reaching, handling, kneeling,
6 pushing, and pulling (Exhibit 40Fp4). Dr. Khan performed [a] subsequent
7 evaluation . . . on August 7, 2006, and January 31, 2007. On both occasions
8 he opined that the claimant was limited to sedentary work (Exhibits 36Fp16,
9 41F, 42F). The undersigned assigns greater weight to the opinion of Dr.
10 Kaeley since he has a longer relationship with the claimant. The undersigned
11 further notes that Dr. Khan indicated that the claimant’s rheumatoid arthritis
12 caused moderate to marked interference with the ability to perform one or
13 more basic work activities. However, the medical record does not describe
14 active rheumatoid arthritis since July 2001. Dr. Khan reported that the
15 claimant’s rheumatoid arthritis was under good control (Exhibit 36Fp16).

16 Tr. 26. The Court finds that, here too, the ALJ did not err.

17 Plaintiff argues the ALJ incorrectly found that his last flare-up occurred in July 2001, but
18 the record supports the ALJ’s determination on this issue. It is true, as plaintiff notes, that he
19 continued to experience symptoms related to his rheumatoid arthritis after July 2001, but the ALJ
20 is correct in pointing out that plaintiff’s last “flare”—that is, in the sense of an exacerbation in his
21 symptoms resulting in a significant impact on his ability to perform work-related activities—
22 happened then. See, e.g., Tr. 484-85 (last flare up of disease activity was in July 2001), 579
23 (same), 672 (same), 1557 (medical expert at May 10, 2007 hearing: “no major disease activity
24 since . . . July of ‘01”), 1577 (medical expert at September 11, 2007 hearing: “the evidence shows
25 that since July of 2001, he has not had any objective evidence of a flare or exacerbation of his
26 rheumatoid process”); 1581 (same).

27 Plaintiff also argues the ALJ erred in failing to clearly articulate what weight she gave to
28 Dr. Khan’s opinions regarding his ability to work, other than stating, as noted above, that he was
29 giving “some” and “greater” weight to that of Dr. Kaeley. But the Court finds nothing vague or
30 confusing in the ALJ’s discussion here. As noted above, and as discussed in greater detail below,

the ALJ assessed plaintiff with a residual functional capacity to perform work at the light exertional level, with certain additional non-exertional limitations. This is essentially what Dr. Kaeley determined plaintiff to be capable of doing in late November 2004, as well. As such, the ALJ properly stated he was giving greater weight to Dr. Kaeley's opinion, as it more accurately reflected his own assessment of plaintiff's RFC. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996) (finding in context of conflicting examining physician opinions, that where opinion of one physician is based on independent clinical findings, it is within ALJ's discretion to disregard that of another examining physician). As for the "some" weight comment, the ALJ also committed no error, since he again properly did not adopt all of Dr. Kaeley's findings, such as, for example, the prohibition against participation in pre-employment activities.⁴

C. Dr. Debley

Plaintiff next challenges the following findings made by the ALJ:

Cara Debley, M.D., performed a consultative physical evaluation on November 6, 2004. In the narrative written report she opined that the claimant could lift or carry 20 pounds occasionally and 10 pounds frequently. Dr. Debley opined that the claimant could stand or walk for six hours and sit for six hours in an eight-hour workday. She opined that an assistive device was not a medical necessity. Dr. Debley opined that the claimant would have frequent postural limitations bending, stooping, crouching, climbing, kneeling, balancing, crawling, and pulling. She opined that the claimant would have frequent manipulative limitations with reaching, feeling, fingering, and handling. Dr. Debley completed a check box form indicating that the claimant could perform climbing and crawling on a frequent basis, which contradicts her narrative report (Exhibit 26F). The undersigned wrote a letter to Dr. Debley requesting clarification of her opinion, but did not receive a response.

As noted by the Appeals Council, in the prior decision the undersigned gave

⁴ Because to be found disabled, plaintiff must establish he is unable to "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months," any limitations or restrictions resulting from attendance at college – clearly a non-medical issue – cannot, as the ALJ found, be the basis of a finding of disability or a disabling condition. 42 U.S.C. § 423(d)(1)(A) (emphasis added); Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

1 great weight to Dr. Debley's opinion that the claimant would have frequent
2 postural and manipulative limitations. The decision noted that a "frequent
3 limitation" meant that a particular activity could be performed frequently (two
4 thirds of a day) rather than a limitation of function for two thirds of a day. Dr.
5 Debley opined that the claimant would have frequent limitations with
6 reaching, feeling, fingering and handling. She did not opine that the claimant
7 could perform these activities on a frequent basis. The undersigned does not
8 accept Dr. Debley's conclusion that the claimant has frequent postural and
9 manipulative limitations. The undersigned notes that Dr. Debley indicated
10 that she based her opinion, in part, on the history provided by the claimant.
11 However, the claimant told Dr. Debley that his job at McDonald's caused
12 stress fractures in his shins. The medical record does not show that the
13 claimant ever had stress fractures in his shins. The claimant also told Dr.
14 Debley that he had daily swelling and pain in his shoulders and right knee.
15 Dr. Debley specifically noted that the claimant's joints could become swollen
16 from overuse. She also indicated that the postural and manipulative
17 limitations she opined were attributable to swelling and pain in the claimant's
18 joints from arthritis. The objective evidence does not show that the claimant
19 has swelling in his joints from arthritis. . . . Dr. [William] Spence[, the
20 medical expert who testified at the September 11, 2007 hearing,] explained
21 that there was no objective evidence of active rheumatoid arthritis or
22 synovitis. Since Dr. Spence was able to consider all of the documentary
23 medical evidence, including the report from Dr. Debley, the undersigned will
24 prefer his opinion. Given that the objective evidence does not show active
25 rheumatoid arthritis, the undersigned finds that the claimant is capable of
26 performing frequent bending, balancing, stooping, kneeling, crouching,
crawling, reaching in all directions, handling, fingering, feeling, and climbing
ramps and stairs.

Tr. 25.

18 In so finding, plaintiff argues the ALJ did not discuss the fact that Dr. Debley reviewed
19 medical records as well, in addition to performing a physical examination. While it is true that
20 Dr. Debley appears to have reviewed at least some of the medical records that existed up to that
21 time, Dr. Spence, who testified nearly three years later, had the benefit of having a much larger
22 record to review. The ALJ, therefore, did not improperly express preference for Dr. Spence's
23 testimony in part on this basis. In addition, as noted by the ALJ and as discussed above herein,
24
25
26

the record is largely devoid of evidence of active rheumatoid arthritis subsequent to July 2001,⁵ which is an additional valid basis upon which the ALJ relied to discount Dr. Debley's opinion and instead rely on Dr. Spence's testimony. Thus, the Court rejects plaintiff's assertion that the ALJ arbitrarily picked and chose aspects of the medical evidence in the record, and ignored other such evidence that may have been more favorable to his position.

D. Dr. Bigley and Dr. Spence

Dr. Spence's medical expert testimony already has been discussed and dealt with in part above. The ALJ further addressed the medical expert testimony in the record in relevant part as follows:

The objective evidence supports a finding that the claimant's juvenile rheumatoid arthritis is controlled with treatment. Dr. [Robert] Bigley[, who testified at the May 10, 2007 hearing,] and Dr. Spence both indicated that there was no objective evidence of a significant flare-up of rheumatoid arthritis since July 2001. Dr. Bigley noted that the written record showed around five transient episodes of moderate pains per year without signs of active arthritis, whereas the claimant testified that he had daily pain and swelling. Dr. Bigley reiterated that the written record did not describe daily pain and swelling. Dr. Spence said that the claimant had no deforming residuals of fibrosis or distortion of joints from rheumatoid arthritis. He noted that there were no objective signs of synovitis in the claimant's joints on

⁵ See also, Tr. 465 (December 28, 2001: "has improved since last flair"), 471 (January 31, 2002: "Overall he is doing well"); 478 (December 27, 2001: "some break through of disease activity with prednisone does of 10 mg"); 492 (October 22, 2001: "overall doing better"), 497-98 (September 17, 2001: flare up by history reported; plaintiff's last follow-up noted to be in July 2001, when he went to emergency room), 505 (August 16, 2001: "decreased flares"), 562 (April 18, 2002: "Overall he has been doing well"), 568 (May 21, 2002: "doing well until one week ago when he started having some right . . . shoulder pain"), 574 (August 15, 2002: "[i]t is likely that his recent right shoulder pain was musculoskeletal"), 592 (April 9, 2004: "his arthritis has been under control mostly"; "denies any conscious symptoms"), 615 (October 10, 2002: "feeling fine"), 619 (December 9, 2002: "has not had any further episodes"), 620 (March 10, 2003: "feeling okay"), 623 (April 4, 2003: "[p]robable flare of arthritis in the left knee"), 625 (June 6, 2003: "doing okay"; "[j]uvenile rheumatoid arthritis, stable"), 649 (December 30, 2003: "feeling better", "[p]robable flare of rheumatoid arthritis"), 654 (February 12, 2004: "without current evidence of [disease] activity"), 671 (September 11, 2002: "fairly stable on his medications"), 679 (July 21, 2004: "doing okay"; "actually doing fairly well"; "he seems to be quite stable"; "[j]uvenile rheumatoid arthritis, currently stable"); 688 (November 6, 2004: "improved with prednisone"), 813 (February 14, 2007: "(juvenile rheumatoid arthritis) with reasonable control"); 1107 (July 19, 2005: "flare-up with decrease in prednisone to 11 mg"), 1365 (December 7, 2005: "currently his disease seems to be under control"), 1373 (August 7, 2005: "rheumatoid arthritis has been under good control"), 1492 (medical expert at June 28, 2004 hearing testifying that plaintiff's inflammatory arthritis was "very low frequency complication").

1 examination. Thus, although the claimant has alleged that he gets swelling in
2 his knees, shoulders, wrists, and fingers with activity, the undersigned notes
that this is not supported by the objective evidence.

3 Dr. Bigley and Dr. Spence both indicated that the claimant's chest pain was not
4 the result of a cardiac condition. It is clear that the claimant's obesity is a
5 significant factor with respect to his pain complaints. Dr. Spence pointed out
6 that anyone with morbid obesity would be expected to experience functionally
limiting pain. The claimant was repeatedly instructed to lose weight, but
remains morbidly obese.

7 . . .

8 Dr. Spence opined that the claimant could lift 20 pounds occasionally and 10
9 pounds frequently. He opined that the claimant could sit for six hours in an
10 eight-hour workday. Dr. Spence opined that the claimant could stand for six
11 hours in an eight-hour workday. He said that he saw nothing in the medical
record to show that the claimant would miss work for physical reasons^[6]. Dr.
12 Bigley opined that the claimant could do light work, but would miss
approximately three days of work per month. The undersigned accepts Dr.
13 Bigley's opinion that the claimant can do light level work. However, the
undersigned does not accept his conclusion that the claimant would miss
14 around three days of work each month. Dr. Spence testified that he saw
nothing in the medical record to show that the claimant's physical problems
15 would cause him to miss work. Counsel submitted more than 500 pages of
additional medical evidence after the hearing on May 10, 2007. Dr. Spence
16 was able to consider this evidence, but Dr. Bigley was not. Since Dr. Spence
reviewed much more medical evidence than Dr. [James M.] Burnell[, the
17 medical expert who testified at the June 28, 2004 hearing,] or Dr. Bigley, the
undersigned assigns greater weight to the opinion of Dr. Spence.

18
19 Tr. 23-25.

20 In challenging the ALJ's findings here, plaintiff first notes Dr. Spence did not examine
21 him, had been retired from internal medicine for 10 years at the time of his testimony and never
22 took the board examination for rheumatology. None of these reasons, however, are sufficient in
23 themselves to call into question the ALJ's reliance on the testimony of Dr. Spence. Although the
24 fact that a physician may be a board certified specialist may warrant giving greater weight to that
25

26 ⁶ In a footnote here, the ALJ also noted that "[a]lthough Dr. Spence used the term 'sedentary,' the functional
limitations he opined are consistent with the light level of exertion (i.e., lift/carry 20 pounds occasionally and 10
pounds frequently, stand for six out of eight hours, and sit for six out of eight hours)."

1 physician's opinion on an issue in his or her area of expertise, the lack of specialization is not a
2 valid basis for finding an ALJ's reliance on a non-specialist's opinion improper. See Benecke v.
3 Barnhart, 379 F.3d 587, 594 n.4 (9th Cir. 2004) (in general, more deference given to opinion of
4 specialist about issues related to his or her area of specialty). Further, there is no requirement
5 that a physician be actively practicing, or practicing in a particular area of, medicine in order to
6 qualify as a medical expert. Indeed, plaintiff did not object to Dr. Spence's qualifications when
7 he testified at the September 11, 2007 hearing, even though plaintiff appeared at the hearing and
8 was represented by counsel at the time. See Tr. 1575.

10 As noted above, furthermore, the opinion of a non-examining physician may constitute
11 substantial evidence, if it is consistent with other independent evidence in the record. See Lester,
12 81 F.3d at 830-31; Tonapetyan, 242 F.3d at 1149. Here, the ALJ properly noted that the medical
13 evidence in the record—including the more than 500 additional pages Dr. Spence reviewed, but
14 Dr. Bigley was not able to—was consistent with Dr. Spence's opinion that plaintiff was capable of
15 performing light work, but not with Dr. Bigley's additional limitation that plaintiff would miss
16 around three days of work each month. For example, that evidence did not show the existence of
17 a significant flare up in plaintiff's rheumatoid arthritis subsequent to July 2001, resulting in work
18 restrictions at the more restrictive level found by Dr. Bigley and reported by plaintiff. Plaintiff
19 further argues the ALJ ignored Dr. Spence's opinion that he was limited to sedentary work only,
20 but as explained by the ALJ, the specific work restrictions Dr. Spence testified to actually were
21 consistent with light exertional work.

24 Lastly, plaintiff takes issue with the fact that while the ALJ indicated at the end of the
25 May 10, 2007 hearing that she would anticipate issuing a favorable decision (see Tr. 1569), a
26 fourth hearing was scheduled for unknown reasons, at which Dr. Spence testified. As plaintiff

1 himself points out, however, a substantial number of additional pages of evidence (more than
2 500 as noted above) were submitted after the May 10, 2007 hearing, but before the September
3 11, 2007 hearing at which Dr. Spence testified. In addition, contrary to plaintiff's assertion, the
4 ALJ did state why she had decided to hold that most recent, fourth hearing, namely the fact that
5 such a large amount of additional evidence had been submitted. Although plaintiff states it was
6 the ALJ who requested the additional evidence, and claims this evidence painted substantially
7 the same picture as that already contained in the record, the Court finds nothing in the record to
8 indicate the ALJ was actually "searching for a different opinion" as plaintiff alleges. (Dkt. #11, p.
9 15); see Schweiker v. McClure, 456 U.S. 188, 195 (1982) (hearing officers who decide social
10 security claims are presumed to be unbiased). There was no error here.

11 II. The ALJ's Step Three Analysis

12
13 At step three of the sequential disability evaluation process, the ALJ must evaluate the
14 claimant's impairments to see if they meet or medically equal any of the impairments contained
15 in the Listings. 20 C.F.R. § 404.1520(d), § 416.920(d); Tackett, 180 F.3d 1094, 1098 (9th Cir.
16 1999). If any of the claimant's impairments meet or medically equal a listed impairment, he or
17 she is deemed disabled. Id. The burden of proof is on the claimant to establish he or she meets or
18 medically equals any of the impairments in the Listings. Tackett, 180 F.3d at 1098. However, "[a]
19 generalized assertion of functional problems is not enough to establish disability at step three." Id.
20 at 1100 (citing 20 C.F.R. § 404.1526).

21
22 A mental or physical impairment "must result from anatomical, physiological, or
23 psychological abnormalities which can be shown by medically acceptable clinical and laboratory
24 diagnostic techniques." 20 C.F.R. § 404.1508, § 416.908. It must be established by medical
25 evidence "consisting of signs, symptoms, and laboratory findings." Id.; see also SSR 96-8p, 1996
26

1 WL 374184 *2 (determination that is conducted at step three must be made on basis of medical
2 factors alone). An impairment meets a listed impairment “only when it manifests the specific
3 findings described in the set of medical criteria for that listed impairment.” Social Security Ruling
4 (‘SSR 83-19’), 1983 WL 31248 *2.

5 An impairment, or combination of impairments, medically equals a listed impairment
6 “only if the medical findings (defined as a set of symptoms, signs, and laboratory findings) are at
7 least equivalent in severity to the set of medical findings for the listed impairment.” Id.; see also
8 Sullivan v. Zebley, 493 U.S. 521, 531 (1990) (‘For a claimant to qualify for benefits by showing
9 that his unlisted impairment, or combination of impairments, is ‘equivalent’ to a listed impairment,
10 he [or she] must present medical findings equal in severity to *all* the criteria for the one most
11 similar listed impairment.’) (emphasis in original). However, ‘symptoms alone’ will not justify a
12 finding of equivalence. Id. The ALJ also “is not required to discuss the combined effects of a
13 claimant’s impairments or compare them to any listing in an equivalency determination, unless
14 the claimant presents evidence in an effort to establish equivalence.” Burch v. Barnhart, 400 F.3d
15 676 (9th Cir. 2005).

16 The ALJ need not “state why a claimant failed to satisfy every different section of the
17 listing of impairments.” Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990) (finding ALJ
18 did not err in failing to state what evidence supported conclusion that, or discuss why, claimant’s
19 impairments did not meet or exceed Listings). This is particularly true where, as noted above,
20 the claimant has failed to set forth any reasons as to why the Listing criteria have been met or
21 equaled. Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001) (finding ALJ’s failure to discuss
22 combined effect of claimant’s impairments was not error, noting claimant offered no theory as to
23
24
25
26

1 how, or point to any evidence to show, his impairments combined to medically equal a listed
2 impairment).

3 In her decision, the ALJ found none of plaintiff's impairments met or medically equaled
4 any of those contained in the Listings. Tr. 19-20. Plaintiff first argues the ALJ failed to consider
5 whether any of his impairments in combination medically equaled any impairment contained in
6 the Listings. But the ALJ expressly made findings in this regard. See id. As he has previously
7 argued, plaintiff again asserts the ALJ erred in finding he experienced no significant flare in his
8 rheumatoid arthritis since July 2001.⁷ Again, however, and for the reasons set forth above, the
9 ALJ did not err in so finding. The Court also rejects plaintiff's contention that the ALJ erred in
10 finding his diagnosed fibromyalgia was not a medically determinable impairment.
11

12 As noted by plaintiff, Dr. Kaeley diagnosed him as having fibromyalgia on more than one
13 occasion. See Tr. 388, 498, 1060, 1083, 1131, 1164, 1283. As the ALJ herself also noted, Dr.
14 Kaeley opined that plaintiff had work-related limitations based in part on that diagnosis. See Tr.
15 26, 1389. The ALJ, though, reasonably found that the objective medical evidence in the record—
16 including, the Court observes, Dr. Kaeley's own treatment notes—did not describe the objective
17 signs and findings necessary to make a fibromyalgia diagnosis. Tr. 19. It is true that a diagnosis
18 of fibromyalgia may not be rejected solely on the basis that it is unsupported by the objective
19 medical evidence in the record. See Benecke v. Barnhart, 379 F.3d 587, 594 (9th Cir. 2004) (ALJ
20 erred in discounting opinions of physicians by relying on own disbelief of claimant's symptoms
21 testimony and his misunderstanding of fibromyalgia). An ALJ, therefore, may not "effectively"
22
23

24 ⁷ For the same reason, the Court rejects plaintiff's additional argument that the ALJ erred in finding him to be only
25 mildly impaired in terms of daily activities, social functioning and concentration, persistence or pace, as not being
26 consistent with his symptoms during his "flare-ups," and improperly concluded, based on Dr. Spence's testimony,
that his rheumatoid arthritis did not rise to "listing level severity" as his flare-ups occurred "intermittently and [did]
not last 12 months." Tr. 19-20; Dkt. #11, pp. 17-18. The Court further notes that at least in regard to concentration,
persistence or pace, the ALJ found plaintiff had "mild to moderate difficulties." Tr. 20 (emphasis added).

1 require there to be “objective” evidence for a disease that eludes such measurement.” Id. (citing
2 Green-Younger v. Barnhart, 335 F.3d 99, 108 (2nd Cir. 2003)).

3 On the other hand, the Ninth Circuit has noted with apparent approval the description of
4 fibromyalgia provided by the Seventh Circuit:

5 [fibromyalgia’s] cause or causes are unknown, there is no cure, and, of greatest
6 importance to disability law, its symptoms are entirely subjective. There are
7 no laboratory tests for the presence or severity of fibromyalgia. The principal
8 symptoms are “pain all over,” fatigue, disturbed sleep, stiffness, and “the only
9 symptom that discriminates between it and other diseases of a rheumatic
10 character” multiple tender spots, more precisely 18 fixed locations on the body
(and the rule of thumb is that the patient must have at least 11 of them to be
diagnosed as having fibromyalgia) that when pressed firmly cause the patient
to flinch.

11 Rollins v. Massanari, 261 F.3d 853, 855 (9th Cir. 2001) (quoting Sarchet v. Chater, 78 F.3d 305,
12 306 (7th Cir. 1996)) (emphasis added). Accordingly, it is the presence of these tender “spots” or
13 “points” that differentiate a diagnosis of fibromyalgia from some other rheumatic-type condition,
14 such as, for example, rheumatoid arthritis. In this case, however, while Dr. Kaeley did find some
15 “[t]ender points” during the physical examination he performed in early March 2001, no specific
16 number was noted. See Tr. 388. Nor were any such points noted during any of the examinations
17 Dr. Kaeley performed from April 2001, through January 2007, in which fibromyalgia also was
18 diagnosed. See Tr. 376, 381, 472, 478, 485, 492, 498, 505, 511, 517, 559, 563, 569, 574, 579-80,
19 584, 588, 598, 1035, 1039, 1050, 1060, 1071, 1083, 1089, 1099, 1121, 1131, 1138, 1150, 1163-
20 64, 1191-92, 1221-22, 1237-38, 1261-62, 1282-83. Nor have any of the other medical sources in
21 the record, including Dr. Roes, diagnosed plaintiff with that condition.
22

23 Even if the diagnosis of fibromyalgia here could be said to be a medically determinable
24 impairment, plaintiff has not shown, nor does the Court find, that any work-related limitations
25 Dr. Kaely found had resulted therefrom rose to Listing-level severity. As for the argument that
26

1 the ALJ incorrectly found plaintiff's pain complaints were unrelated to his rheumatoid arthritis,
2 but instead stemmed from his obesity, this is not what the ALJ actually found. Rather, the ALJ
3 stated that obesity was "a significant factor with respect to" those complaints. Tr. 24. Nowhere in
4 her decision did the ALJ actually state plaintiff experienced no pain or other symptoms due to his
5 rheumatoid arthritis. Indeed, the ALJ found it to be a severe impairment, resulting in part in a
6 limitation to a modified range of light work.

7
8 Any error by the ALJ, furthermore, in attributing issues with pace to plaintiff's obesity
9 was harmless, as no showing has been made that such error, if any exists, impacted the ALJ's
10 ultimate disability determination. See Stout v. Commissioner, Social Security Admin., 454 F.3d
11 1050, 1055 (9th Cir. 2006) (error harmless where it is non-prejudicial to claimant or irrelevant to
12 ALJ's ultimate disability conclusion). Lastly, it should be noted that none of the medical sources
13 in the record, including all three testifying medical experts, found plaintiff's impairments either
14 singly or in combination met or medically equaled any of those contained in the Listings. Thus,
15 the ALJ's step three determination was not improper.
16

17 III. The ALJ's Assessment of Plaintiff's Credibility

18 Questions of credibility are solely within the control of the ALJ. Sample v. Schweiker,
19 694 F.2d 639, 642 (9th Cir. 1982). The Court should not "second-guess" this credibility
20 determination. Allen, 749 F.2d at 580. In addition, the Court may not reverse a credibility
21 determination where that determination is based on contradictory or ambiguous evidence. Id. at
22 579. That some of the reasons for discrediting a claimant's testimony should properly be
23 discounted does not render the ALJ's determination invalid, as long as that determination is
24 supported by substantial evidence. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001).
25

26 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent

1 reasons for the disbelief.” Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).
2 The ALJ “must identify what testimony is not credible and what evidence undermines the
3 claimant’s complaints.” Id.; Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless
4 affirmative evidence shows the claimant is malingering, the ALJ’s reasons for rejecting the
5 claimant’s testimony must be “clear and convincing.” Lester, 81 F.2d at 834. The evidence as a
6 whole must support a finding of malingering. O’Donnell v. Barnhart, 318 F.3d 811, 818 (8th Cir.
7 2003).
8

9 In determining a claimant’s credibility, the ALJ may consider “ordinary techniques of
10 credibility evaluation,” such as reputation for lying, prior inconsistent statements concerning
11 symptoms, and other testimony that “appears less than candid.” Smolen v. Chater, 80 F.3d 1273,
12 1284 (9th Cir. 1996). The ALJ also may consider a claimant’s work record and observations of
13 physicians and other third parties regarding the nature, onset, duration, and frequency of
14 symptoms. Id.
15

16 Here, the ALJ discounted plaintiff’s credibility in part because despite plaintiff’s claims of
17 disabling symptoms related to his rheumatoid arthritis, the record lacked objective medical
18 evidence of any significant flare-ups since July 2001, or of any “deforming residuals,” joint
19 distortions, “signs of synovitis” or significant swelling. Tr. 23. A determination that a claimant’s
20 subjective complaints are “inconsistent with clinical observations” can satisfy the clear and
21 convincing requirement. Regennitter v. Commissioner of SSA, 166 F.3d 1294, 1297 (9th Cir.
22 1998). Plaintiff argues his complaints are supported by Dr. Kaeley’s diagnoses of inflammatory
23 arthritis, but mere diagnoses are insufficient to establish disability. See Matthews v. Shalala, 10
24 F.3d 678, 680 (9th Cir. 1993).
25

26 The ALJ also discounted plaintiff’s credibility in part on the basis that this rheumatoid

1 arthritis was largely “controlled with treatment.” Tr. 23. The ALJ may discount a claimant’s
2 credibility on the basis of medical improvement. See Morgan v. Commissioner of Social Sec.
3 Admin., 169 F.3d 595, 599 (9th Cir. 1999); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998).
4 Plaintiff does not specifically challenge this basis for discounting his credibility, and the Court
5 finds it to be largely supported in the record. For example, the record establishes that since July
6 2001, plaintiff’s condition has remained for the most part controlled at therapeutic levels. See Tr.
7 161, 164-65, 167-69, 172-73, 178, 180-81, 184, 471, 477-78, 491, 497, 592, 688, 1237-38, 1262,
8 1328, 1365, 1557, 1578.

9
10 The ALJ next discounted plaintiff’s credibility for the following reasons:

11 The claimant’s activities demonstrate that he is more capable than alleged. He
12 obtained two Associate of Arts degrees and a Bachelor of Arts degree. The
13 claimant indicated that he completed the Associate degrees in a normal
14 amount of time. He said that he had a 3.9 G.P.A. when he completed his
15 Bachelor’s degree in December 2005. While the claimant may not have spent
16 40 hours per week on his college coursework, his ability to complete three
17 degrees shows a functional ability greater than he asserts. The claimant went
18 to a gym for 6 months during the relevant period, which indicates that he can
19 tolerate exercising. A report dated November 26, 2001, shows that the
20 claimant reported having injured his left wrist a week earlier after rough
21 housing with his brother and boxing (Exhibit 12Fp14). These activities are
22 inconsistent with the degree of debility alleged. The claimant told Dr. [David
23 C.] Brose[, Ph.D.,] that he prepared his own food and shared housework and
24 grocery shopping with his fiancé. Records from Dr. Kaeley include several self
25 assessments in which the claimant indicated that he had no difficulty walking
26 outdoors on flat ground, bending down to pick up clothing from the floor, or
participating in sports or games. He indicated that he could walk two miles
with “some” difficulty (Exhibit 12Fp4, 24, 38). On February 12, 2004, the
claimant reported that he could lift, climb five steps, cook, vacuum, make a
bed, and walk an unlimited distance on flat ground without difficulty (Exhibit
33Fp1). On June 6, 2006, the claimant indicated that he could walk two miles
with “much” difficulty and could walk outdoors on flat ground without
difficulty (Exhibit 32Fp234). These reports indicate that his physical capacity
is greater than he alleged at the hearings. The claimant testified that his job in
2006 ended because his symptoms prevented him from getting to work in a
timely fashion. However, elsewhere he reported that he could not afford to
drive to the job and was looking for other work (Exhibit 32Fp160). This is
inconsistent with his testimony.

Tr. 24. To determine whether a claimant's symptom testimony is credible, the ALJ may consider his or her daily activities. Smolen, 80 F.3d at 1284. Such testimony may be rejected if the claimant "is able to spend a substantial part of his or her day performing household chores or other activities that are transferable to a work setting." Id. at 1284 n.7. The claimant need not be "utterly incapacitated" to be eligible for disability benefits, however, and "many home activities may not be easily transferable to a work environment." Id.

While some of the activities the ALJ noted above may not indicate an ability to perform them necessarily for a substantial part of the day or may not be entirely transferrable to a work setting as argued by plaintiff, others certainly do. As discussed previously, plaintiff's success in pursuing his college degrees does not demonstrate the level of disability he currently is alleging, but rather is indicative of an ability to persist and perform on a consistent basis at a fairly high level of success, even though he may not have pursued his studies for a full 40 hours per week.⁸ In terms of physical capacities, as the ALJ noted the ability to go to the gym for six months and to engage in fairly rigorous physical behavior (such as boxing and walking for up to two miles at a time) further demonstrates that plaintiff is not as disabled in that regard as he claims. Further, the Court notes that plaintiff's inconsistent report concerning his ability to perform his prior job in 2006, calls into additional question his credibility regarding his subjective complaints. See Smolen, 80 F.3d at 1284.

⁸ Plaintiff's assertion that the ALJ erred in failing to consider that he merely was attempting to improve his life by advancing his education is beside, or rather proves, the point. That is, plaintiff's success in pursuing an advanced education actually shows he possesses greater work-related capabilities than he is alleging. In other words, while it may be admirable on plaintiff's part to try to improve his life, at the same time it demonstrates a lack of credibility in terms of his claimed inability to actually do so based on his asserted impairments. Again, as discussed previously and plaintiff's assertions notwithstanding, the evidence in the record – including plaintiff's own testimony – reveal not that it took plaintiff 13 months longer than the length of the program to complete his most recent degree, but that he participated in an "accelerated" program, which he completed within that shortened period of time, in addition to completing his two associates degrees in an apparently quicker normal amount of time as well.

1 Finally, plaintiff takes issue with the fact that the ALJ's discounted his credibility in part
2 on the basis of the written statement provided by his mother:

3 The claimant's mother, Rhonda Jones, completed a function report on March 7,
4 2002. She reported that the claimant's ability to move depended on how active
5 his disease was. Ms. Jones indicates that the claimant experienced frequent
6 flares with pain ranging from mild to severe. She said that the claimant never
7 knew whether a day would be relatively pain free or entail incapacitating pain
8 (Exhibit 9E).

9 . . .

10 The undersigned assigns weight to [plaintiff's mother's statement] appropriate
11 to [its] probative value. It is noted that Ms. Jones indicated that the claimant
12 had days that were relatively pain free, which contradicts the claimant's
13 testimony. . . .

14 Tr. 28. Plaintiff argues the ALJ's findings fail to take into account his own testimony later at the
15 September 11, 2007 hearing, that his condition had worsened. But, as discussed above, the ALJ
16 properly discounted plaintiff's testimony in part because the evidence in the record demonstrated
17 that his rheumatoid arthritis was largely controlled on medication. As such, the ALJ did not have
18 to adopt the testimony of plaintiff over the report of his mother indicating he had days that were
19 relatively pain free, contrary to plaintiff's allegations of disabling pain.

20 IV. The ALJ's Step Five Analysis

21 If a disability determination "cannot be made on the basis of medical factors alone at step
22 three of the evaluation process," the ALJ must identify the claimant's "functional limitations and
23 restrictions" and assess his or her "remaining capacities for work-related activities." SSR 96-8p,
24 1996 WL 374184 *2. A claimant's residual functional capacity assessment is used at step four to
25 determine whether he or she can do his or her past relevant work, and at step five to determine
26 whether he or she can do other work. Id. It thus is what the claimant "can still do despite his or
her limitations." Id.

1 A claimant's RFC is the maximum amount of work the claimant is able to perform based
2 on all of the relevant evidence in the record. Id. However, a claimant's inability to work must
3 result from his or her "physical or mental impairment(s)." Id. Thus, the ALJ must consider only
4 those limitations and restrictions "attributable to medically determinable impairments." Id. In
5 assessing a claimant's residual functional capacity, the ALJ also is required to discuss why the
6 claimant's "symptom-related functional limitations and restrictions can or cannot reasonably be
7 accepted as consistent with the medical or other evidence." Id. at *7.

9 If a claimant cannot perform his or her past relevant work, at step five of the disability
10 evaluation process the ALJ must show there are a significant number of jobs in the national
11 economy the claimant is able to do. Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520(d), (e), §
12 416.920(d), (e). The ALJ can do this either through the testimony of a vocational expert or by
13 reference to the Commissioner's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at
14 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

16 An ALJ's findings will be upheld if the weight of the medical evidence supports the
17 hypothetical posed by the ALJ. Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant
18 v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony therefore
19 must be reliable in light of the medical evidence to qualify as substantial evidence. Embrey v.
20 Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the claimant's
21 disability "must be accurate, detailed, and supported by the medical record." Embrey, 849 F.2d at
22 422 (citations omitted). The ALJ, however, may omit from that description those limitations he
23 or she finds do not exist. Rollins, 261 F.3d at 857.

25 In this case, the ALJ assessed plaintiff with the following RFC:

26 **... the claimant has had the residual functional capacity to lift and/or
carry 20 pounds occasionally and 10 pounds frequently. He can stand**

1 **and/or walk for six hours in an eight-hour workday. The claimant can sit**
2 **for six hours in an eight-hour workday. He can do frequent pulling with**
3 **his upper extremities. The claimant needs to alternate between sitting**
4 **and standing approximately every hour. He can frequently bend,**
5 **balance, stoop, kneel, crouch, and crawl. The claimant should not climb**
6 **ladders, ropes, or scaffolds. He can frequently climb ramps and stairs.**
7 **The claimant can do frequent reaching in all directions, frequent**
8 **handling, frequent fingering, and frequent feeling. The claimant needs to**
9 **be in a work environment that provides training in proper work pace.**

10 Tr. 20 (emphasis in original). At the August 16, 2005 hearing, the ALJ posed a hypothetical
11 question to the vocational expert containing substantially the same limitations as he included in
12 his assessment of plaintiff's residual functional capacity. See Tr. 1517. In response thereto, the
13 vocational expert testified that there were other jobs an individual with those limitations, and
14 with the same age and education as plaintiff and no past relevant work, could do. See Tr. 1518.
15 Based on that vocational expert's testimony, the ALJ found plaintiff to be capable of performing
16 other jobs existing in significant numbers in the national economy. See Tr. 29-30.

17 Plaintiff argues the ALJ erred in ignoring the testimony of the vocational experts at the
18 May 10, 2007, and September 11, 2007 hearings, both of whom testified that an individual who
19 would miss three days of work per month, would not be able to perform competitive work (see
20 Tr. 1568-69) and would be "well beyond the tolerance of most employers" (see Tr. 1609). But, as
21 discussed above, the ALJ did not err in finding the evidence in the record did not support such a
22 limitation. As such, the testimony of these two vocational experts on this issue is irrelevant to
23 the ALJ's ultimate disability determination. Similarly, because, also as discussed above, the ALJ
24 properly found the evidence in the record did not support the type of manipulative or reaching
25 limitations plaintiff alleges he has, or that he has significant limitations in his ability to interact
26 appropriately with supervisors or co-workers (given that the ALJ did not err in finding only mild
 difficulties in social functioning, again as discussed above), he also was not required to include

1 those limitations in the hypothetical question he posed to the vocational expert.

2 CONCLUSION

3 Based on the foregoing discussion, the Court finds the ALJ properly determined plaintiff
4 to be not disabled. Accordingly, the ALJ's decision hereby is AFFIRMED.

5 DATED this 6th day of October, 2010.

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9 Karen L. Strombom
10 United States Magistrate Judge
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